THE RECORD
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

EDITORIAL BOARD

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THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 9 | MAY 1954 | *Number 5*

Association Activities

THIS SESSION of the Legislature approved bills introduced by Senator Mitchell (S. Int. 2155) and Assemblyman Brook (A. Int. 2604) which would amend Article VI, Section 19 of the Constitution so as to prohibit judges while holding judicial office in the state from becoming candidates for any other office than a judicial office. Before the amendment is submitted for approval to the voters, a second session of the Legislature will have to act favorably on it. However, the enactment of this legislation marks the first step in implementing by legislation a resolution which the Association adopted at a Stated Meeting held on February 13, 1946. The resolution as adopted at that meeting is as follows:

> WHEREAS, Canon 30 of the Canons of Judicial Ethics provides, in part as follows: "While holding a judicial position he (a Judge) should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party"; and
>
> WHEREAS, Article VI, Section 19, of the Constitution of the State of New York provides, in part, as follows: "The judges of the court of appeals and the justices of the supreme court shall not hold any other public office or trust, except that they shall be eligible to serve

as members of a constitutional convention. All votes for any such judges or justices for any other than a judicial office or as a member of a constitutional convention, given by the legislature of the people, shall be void";

Now, therefore, be it

RESOLVED, that it is the sense of The Association of the Bar of the City of New York that said provisions of Canon 30 of the Canons of Judicial Ethics should be interpreted as applying to all holders of judicial offices in the State of New York, and not as being limited to the Judges of the Court of Appeals and the Justices of the Supreme Court; and be it

FURTHER RESOLVED, that no one, while holding any judicial office in the State of New York, ought to be permitted to become a candidate for any office other than a judicial office; and be it also

FURTHER RESOLVED, that the officers of the Association and the appropriate committees be instructed to interpret and enforce Canon 30 of the Canons of Judicial Ethics as applying to all holders of judicial offices in the State of New York and that, if necessary, such officers and committees should take action to secure an amendment to Article VI, Section 19 of the Constitution of the State of New York which would in effect extend the constitutional restriction now applicable to Judges of the Court of Appeals and Justices of the Supreme Court to all members of the judiciary in the State of New York.

A FORUM on "Problems Under Workmen's Compensation and Disability Benefits Laws," sponsored by the Committee on Insurance Law, James B. Donovan, Chairman, was held on April 13. The speakers and their topics were: Robert E. Marshall, Administrative Deputy, New York State Workmen's Compensation Board, "The Future Social Significance of Compensation and Disability Benefits Laws"; Raymond N. Caverly, Vice President, America Fore Insurance Group, "History and Objectives of Compensation and Disability"; and Samuel Kaltman, Attorney, Aetna Casualty and Surety Company, "The Technical Handling of Compensation Cases."

A second forum on April 26 sponsored by the Committee was devoted to a discussion of "Highlights of Personal Accident and Health Insurance." The speakers and their topics were: John F. McAlevey, Counsel, Bureau of Accident and Health Underwriters, "Coverages Available and Regulatory Aspects"; J. Ed-

win Dowling, Associate General Counsel, Metropolitan Life Insurance Company, "Customary Policy Provisions" and Leon Wasserman, "Court Interpretation of Words and Phrases."

"ACTS OF Foreign Governments Before American Courts" was the subject of discussion at a symposium sponsored by the Committee on Foreign Law, Willis L. M. Reese, Chairman. Otto C. Sommerich, Chairman of the Forum Subcommittee, presided. Speakers were: Professor Philip C. Jessup, Hamilton Fish Professor of International Law and Diplomacy, Department of Law and Government, Columbia University and Professor Jack B. Tate, Professor of Law, New York University School of Law. The Honorable Charles E. Clark also participated.

IN CONNECTION with the consideration by the House of Representatives of Congressman Keating's bill (H.R. 8649) on wiretapping, the Committee on Federal Legislation, of which Theodore Pearson is Chairman, sent to the Congress an interim report opposing enactment of this bill. The committee's main objection to the bill was its failure to require that a federal judge must approve any wire-tap in advance and upon a showing of reasonable grounds therefor. The interim report stated:

> "In essence, the bill is not materially different from one which was introduced last summer at the request of the Attorney General (H.R. 5149, Reed) and rejected by a Judiciary subcommittee after hearings. It falls far short of providing such safeguards as were contained in the bill which the subcommittee reported favorably without dissent. (H.R. 477, Keating)
>
> "The importance of a prior court order for any wire-tap is much the same as in the case of a search warrant. The requirement of a search warrant is made 'so that an objective mind might weigh the need . . . The right of privacy

was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing' . . . (*McDonald* v. *U. S.*, 335 U. S. 451, 455)

"District Attorney Miles F. McDonald testified favorably as to his experience under the New York statute requiring a prior court order for any wire-tap: 'I think prosecutors, myself included, can be overzealous . . . the judge is a safeguard.' He also testified that he had 'Never' had any bad experience so far as leakages in the court are concerned."

The Committee noted that it believed that a sound statute on wire-tapping could be drawn and should be enacted. The Committee is now at work on a comprehensive report dealing with the variety of problems which legislation in this field necessarily involves. It is anticipated the report will be ready for publication in the near future.

THE HONORABLE David W. Peck, Presiding Justice, Supreme Court, Appellate Division, First Department, delivered the Thirteenth Annual Benjamin N. Cardozo Lecture before a large audience on April 22. Presiding Justice Peck spoke on the subject, "The Complement of Court and Counsel." Justice Peck's lecture will be published in THE RECORD for June.

THE COMMITTEE on Taxation, John H. Alexander, Chairman, has submitted to the Senate Finance Committee an initial report on H. R. 8300, the Internal Revenue Code of 1954. Because of the limited time available between publication of the bill and scheduled action on it, this initial report is limited to those topics of major importance on which the Committee was able to reach conclusions prior to appearance of the Committee's representative before the Senate Finance Committee. One or more supple-

mentary reports will be submitted as soon as possible covering such matters as taxation of partnerships, foreign income, provisions relating to procedure and administration and some of the less important revisions of existing law. Copies of the Committee's reports may be obtained from the Executive Secretary.

THE COMMITTEE on the Domestic Relations Court, Maurice Rosenberg, Chairman, held a well atended forum on April 5. The subject for discussion was, "Does the Experience of the Domestic Relations Court Show Need for a Unified Family Court?" The speakers were: The Honorable Bolitha J. Laws, Chief Judge of the United States District Court for the District of Columbia, The Honorable Jane M. Bolin, Justice of the Domestic Relations Court, Allen T. Klots, Chairman of the Special Committee on the Study of the Administration of Laws Relating to the Family, and Murray I. Gurfein, a member of The Temporary Commission on the Courts. Following the addresses, the speakers answered questions from the floor.

THE NINTH ANNUAL Art Exhibition will open on May 4 at 4:30 P.M. Lloyd Goodrich, Associate Director of the Whitney Museum of American Art, is advisor to the Art Exhibition Committee of which Harold J. Baily is the Chairman. The Exhibition is sponsored by the Committee on Art, John W. Thompson, Chairman.

ORRIN G. JUDD, who has generously acted as the Associations's legislative adviser for the past three years, submitted an encouraging report on the progress of legislative measures sponsored by the Association in the last session of the Legislature. Three of the Association measures were passed, five made some progress, and four did not move at all. Although this record is disappointing in some respects, it represents an improvement over previous

years. An especially encouraging feature is that two measures which had been defeated in previous years were passed this year, and several other bills which made some progress offer good hope for success in the next session.

In his report Mr. Judd says, "Our experience this year demonstrated again that it is essential to confer with state and private agencies which may be affected by Association bills long before the Legislature is convened. Often our bills present problems which can be settled to the satisfaction of all concerned before the bill is introduced. There is seldom time to work out compromises or satisfy objections after a bill has been introduced and reported out in or passed one house."

A summary of Mr. Judd's report follows:

1. *Judges seeking non-judicial office.* The passage of this bill is reported on elsewhere in THE RECORD.

2. *Interrogatories in foreign countries.* This bill, sponsored by the Committee on Foreign Law, Willis L. M. Reese, Chairman, amends the Civil Practice Act (a new Sect. 309-a) to facilitate the taking of interrogatories in a foreign language (A. Int. 1119, Wilson; S. Int. 1169, Hughes). Although the bill again had the opposition of the Judicial Council, it did not receive opposition from upstate legislators as it had in former sessions. The bill was signed by the Governor as Chapter 212 of the Laws of 1954.

3. *Stays of actions brought in violation of arbitration agreements.* This bill, sponsored by the Committee on Arbitration, Sylvan Gotshal, Chairman, (A. Int. 1504, Teller; S. Int. 1194, Moritt) was passed and signed by the Governor as Chapter 187 of the Laws of 1954. The bill amends Section 1451 of the Civil Practice Act to permit courts other than the Supreme Court to stay proceedings brought before them in violation of arbitration agreements.

4. *Fire insurance proceeds.* This bill, sponsored, by the Committee on Real Property Law, Albert W. Fribourg, Chairman, provided that mortgagors who repair damages covered by insurance may retain the proceeds as against mortgagees. The bill had the opposition of bankers groups. The bill as sponsored by the

Committee on Real Property Law was introduced twice in each house (S. Int. 27, Williamson; S. Int. 250, Koerner; A. Int. 334, Graci; A. Int. 1018, Horan). Near the close of the session these original bills were amended in several respects, and substitute bills which the Association supported were introduced (S. Int. 2388, Hatfield; A. Int. 2764, Goddard). The Goddard bill was carried in the Assembly but not reported in the Senate.

5. *Mortgage dummies.* Another bill recommended by the Committee on Real Property Law would have authorized banks and fiduciaries to invest in mortgages not accompanied by bonds or notes (S. Int. 1762, Mitchell; A. Int. 1303, Wilson). The State Banking Department opposed the measure and the bill was not passed.

6. *Damages for fraudulently dispossessed tenants.* Also recommended by the Committee on Real Property Law was a bill to amend Section 1444–a of the Civil Practice Ast so as to define the circumstances in which actions for damages may be brought by tenants fradulently dispossessed from housing accommodations (S. Int. 1181, Hults; A. Int. 1367, Carlino), The bill was reported out in the Senate and advanced to third reading but was killed in the Assembly because of reluctance to create new liabilities under the rent laws.

7. *Procedure for review of refusal to renew permits or licenses by the State Liquor Authority.* In accordance with the recommendation of the Association's Committee on Administrative Law, Edward J. Ennis, Chairman, bills were introduced to amend Section 114(5) of the Alcoholic Beverage Control Law (S. Int. 1133, Bauer; A. Int. 1828, Blodgett). An identical bill sponsored in the Assembly by Assemblyman Butler (A. Int. 828) was passed, sent to the Senate, passed there and sent to the Governor. Later, however, the bill was recalled by the Legislature and recommitted to Committee.

8. *Review of administrative penalties.* Another bill, supported by the Committee on Administrative Law but prepared by the Committee on Administrative Law of the New York State Bar Association, would have broadened the power of the court to re-

view in Article 78 proceedings the extent of penalty or discipline imposed (A. Int. 1599, Wilson). This bill passed both houses but was vetoed by the Governor with a memorandum suggesting that such review be limited to particular types of proceedings.

9. *Subpoenas before administrative agencies.* The Committee on Administrative Law also sponsored a bill which would have authorized counsel to obtain subpoenas for use in administrative hearings without having to prepare supporting memoranda and without disclosing the persons, documentary matter, or evidence for which such subpoenas were to be used (S. Int. 1373, Hughes; A. Int. 1599, Wilson). The bill had the active support of the New York State Bar Association. Although the bill advanced to third reading in the Senate, strong opposition from the Public Service Commission and a number of regulated utilities in the State prevented the bill from passing.

10. *Comparative negligence.* The Committee on Law Reform, George G. Gallantz, Chairman, with the approval of the Association submitted a bill to amend the Civil Practice Act to incorporate the doctrine of comparative negligence (A. Int. 2086, Brook). A comparative negligence bill in a different form, introduced by Senator Williamson, (S. Int. 1097) was reported out of Committee but did not advance. In view of the fact that The Temoprary Commission on the Courts has this matter under consideration, further action should probably await action by the Commission.

11. *Matrimonial Law Commission.* Mrs. Janet Hill Gordon did not this year introduce her bill providing for the establishment of a Commission to study family laws and their administration. The bill was introduced in the Senate by Senator Peterson (S. Int. 1039). Although the bill was reported out in the Assembly in 1953 and defeated by a floor vote, the legislation did not move at all this year. There would seem to be better hope for its enactment during a session which does not precede State elections.

12. *Impounding of motor vehicles.* The Association's Committee on Insurance Law, James B. Donovan, Chairman, again proposed its bill to impound automobiles involved in accidents as a means of assuring satisfaction to the injured person (S. Int.

1073, Koerner). This proposal was primarily an alternative to the Governor's strongly supported proposals for compulsory motor vehicle insurance. Since the Governor's proposal was not finally defeated until the last day of the session, there was no opportunity for the consideration of this bill.

In his report Mr. Judd noted that all members of the Legislature were most helpful in their cooperation with the Association, and that the following legislators, among others, were particularly diligent in advancing measures which the Association sponsored: Senators Stanley J. Bauer, Ernest I. Hatfield, John H. Hughes, William S. Hults, Jr., Milton Koerner, MacNeil Mitchell, Fred G. Moritt, Dutton S. Peterson and Pliny W. Williamson; and Assemblymen Vernon W. Blodgett, John Robert Brook, William J. Butler, Joseph F. Carlino, J. Eugene Goddard, Angelo Graci, William F. Horan, Justin C. Morgan, Ludwig Teller and Malcolm Wilson.

THE HONORABLE Guy Farmer, Chairman of the National Labor Relations Board, spoke before a meeting of the Section on Labor Law of the Committee on Post-Admission Legal Education, of which Malcolm Fooshee is Acting Chairman. Robert A. Levitt, is Chairman of the Section. Mr. Farmer spoke on "The New National Labor Relations Board and its Work."

THE LAWYERS Placement Bureau has been advised that there are two openings for lawyers, one of whom should have a good grounding in electronics, and the other experience in anti-trust litigation. Inquiries should be directed to Mrs. Ruth B. Traynor, Placement Director, 36 West 44th Street, New York 36, Murray Hill 2–0606.

AT THE Annual Meeting to be held on Tuesday, May 11, the officers of the Association will be elected.

The President will accept a portrait bust of Mr. John W. Davis

which is presented by friends of Mr. Davis. The bust is the work of the well known American sculptor, Miss Eleanor Platt.

The Committee on the Bill of Rights, George S. Leisure, Chairman, will present a report on Published Comment on Pending Litigation and Proposed Amendment to Section 20 of the Canons of Professional Ethics.

Interim reports will be received from the Committee on Law Reform, George G. Gallantz, Chairman, and the Joint Committee on the Lawyers Placement Bureau, Joseph A. Sarafite, Chairman.

The Calendar of the Association for May and June

(As of April 27, 1954)

May 3 Dinner Meeting of Committee on Atomic Energy
Dinner Meeting of Committee on Federal Legislation
Meeting of Committee on Municipal Court
Dinner Meeting of Committee on Professional Ethics

May 4 *Opening of Annual Art Exhibition, 4:30 P.M.*
Luncheon Meeting of Committee on Studies and Surveys of Administration of Justice

May 5 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates
Meeting of Committee on Legal Aid at N.Y.U. Law Center

May 6 Dinner Meeting of Committee on Domestic Relations Court
Annual Dinner of Committee on the Surrogates' Courts
Meeting of Section on Taxation

May 10 Meeting of Committee on the City Court
Dinner Meeting of Committee on Military Justice
Dinner Meeting of Committee on Municipal Affairs

May 11 *Annual Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
Meeting of Committee on Aeronautics
Luncheon Meeting of Special Committee on Study of Antitrust Laws as Applied to Foreign Commerce

May 12 Dinner Meeting of Committee on Insurance Law

May 14 Celebration of French Civil Code

May 17 Dinner Meeting of Committee on Law Reform
Meeting of Library Committee

May 18 Meeting of Section on Litigation

May 19 Meeting of Committee on Admissions
Seminar sponsored by Committee on Arbitration
Dinner Meeting of Committee on Courts of Superior Jurisdiction

May 20 Meeting of Section on Corporate Law Departments

May 25 Meeting of Art Committee

May 27 Meeting of Committee on Trade Regulation and Trade-Marks

June 1 Dinner Meeting of Young Lawyers Committee

June 2 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

June 7 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics

June 10 Dinner Meeting of Committee on Admiralty

June 16 Meeting of Committee on Admissions

The Dilemma of the Criminal Lawyer

By Newman Levy

It is sad but undoubtedly a fact that the lawyer who specializes in defending persons charged with crime, the so-called criminal lawyer, is the pariah of the legal profession. Not that his more reputable brother on the civil side enjoys the universal approval of society. Carl Sandburg expressed a widely prevalent feeling when he wrote his acid verses,

> "Why is there always secret singing
> When a lawyer cashes in?
> Why does a hearse horse snicker
> Hauling a lawyer away."

But it is fair to assume, if Sandburg is right, that the secret singing is more jubilant and the horse snickers are more raucous upon the demise of a criminal lawyer.

One plausible explanation of the disrepute of the criminal lawyer is that there is less money in criminal law than in other branches, and, as Veblen demonstrated convincingly, there is a close affinity between reputability and a substantial bank account. But this is only a partial explanation. Scientists, teachers, and clergymen are notoriously underpaid, yet they are frequently socially acceptable.

Perhaps an explanation that comes closer to the truth is the curious identification in the popular mind of the criminal lawyer with his clients. A lawyer who defends a pickpocket is regarded as, if not actually a pickpocket, a sort of accessory pickpocket. This unfortunate absurdity is fostered not only by the movies and the lurid press, but also by the supercilious attitude of civil

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Editor's Note: Mr. Newman Levy, a member of the Executive Committee, has had wide experience in the trial of criminal cases, and has long been interested in the administration of criminal law. He has served as a member of the Association's Committees on Entertainment, Criminal Courts, Law and Procedure, and Professional Ethics.

lawyers who smugly boast that they would not touch a criminal case with a ten-foot pole. Small wonder that laymen readily accept the supposedly better informed judgment of lawyers.

Let me say here that it is possible to practice criminal law honorably and ethically and in accordance with the highest professional traditions. I have known most of the leading criminal lawyers in New York City in my time, and I know that not only have their professional standards been as high as those of their brethren on the civil side, but they demonstrated, on the whole, a greater sense of dedication and social responsibility.

Why then is it considered more respectable to represent a man who breaks a contract than to represent one who breaks a safe? I believe that the answer requires an examination into the nature of a criminal trial, and the function that the criminal lawyer performs.

Under our system of jurisprudence a trial is what is sometimes called an adversary proceeding; that is, it is a contest between two opposing teams, with each team doing its best to win. In a civil trial the opposing teams are private parties fighting for their private interests. In a criminal trial one team is Organized Society and the other is the Defendant, a person who is accused of having committeed an anti-social act. And the criminal lawyer is on the side of the Defendant.

Theoretically a trial is a quest for truth, an instrument for achieving justice. The apologists for our Anglo-American method of trying cases declare that if the contest is between two intensely partisan teams, each bent upon winning, the truth must ultimately emerge and justice will prevail. In the middle of this conflict sits the judge who acts as referee to see that the rules of the game are observed.

It must be evident that in a contest such as this only one side ordinarily is interested in seeing that truth and justice prevail. It may be the prosecution or it may be the defense, but the conclusion is inescapable that if one side is right the other must be wrong, and the objective of the wrong team is to suppress or distort the truth and frustrate justice.

It is my belief, after many years of experience in criminal cases, that the majority of defendants who are arraigned for trial are guilty. There may be extenuating circumstances, and there often are technical flaws in the prosecution's case, but, by and large, most criminal trials deal with defendants who have committed the acts charged in the indictments.

I have read Borchard's *Convicting the Innocent,* a study of some sixty cases in which men were unjustly convicted, and I have had several instances in my own experience when I believed that the convicted defendants were innocent. But these cases are remarkably rare, considering that our trial procedure is based upon fallible human testimony. I might add that it is even more rare for a prosecutor to prosecute a defendant in whose guilt he did not believe.

I should point out that guilt or innocence is not a matter of black and white. There is an obvious difference of culpability between the mother who steals bread to feed her starving children and the professional thief who steals your watch. But this is a moral and philosophical difference with which criminal law has no concern. Confusion arises from the fact that the law frequently uses the terminology of ethics to describe legal concepts. When the law speaks of "guilt" or "innocence" it means simply, Did the defendant commit the act he is charged with? The function of mercy, often considerably strained, reposes exclusively in the judge—after conviction. The jury in theory is merely a fact finding device.

When the fact to be ascertained is, as I believe it to be in the majority of cases, whether the defendant has done an act inimical to the peace and security of society, then the reason for the widespread suspicion of the criminal lawyer becomes more understandable. If he is defending a guilty person, and he usually is, his job is to prevent that fact from coming to light. In a quasi-sporting event between Society of which, incidentally, he is a member, and its enemy, he is the captain and quarterback of the enemy's team. And by one of those curious anomalies that pervade the law he is performing a professionally praiseworthy

task and at the same time he suffers professional and social stigma for it.

Organized society, and especially that influential section of it that is found in the legal profession, finds itself in this curious dilemma. It recognizes that the right to adequate representation by counsel is one of the strongest bulwarks of our liberties. Without it no man would be safe. Also it realizes that the successful activities of criminal lawyers tend to weaken the defenses of society against its enemies.

In making our choice in favor of adequate legal representation we have unquestionably chosen the better good. Nevertheless, because of its social implications, a shadow of disapproval surrounds the criminal lawyer's activities. It resembles the popular attitude toward the public scavenger who performs an unquestionably useful social function, but who, because of the nature of his occupation, is ordinarily not invited to the more exclusive homes.

I have defended many murderers, robbers and burglars in my day. In the words of the Judge in Gilbert and Sullivan's Trial by Jury,

> "All thieves who could my fees afford
> Relied on my orations,
> And many a burglar I've restored
> To his friends and his relations."

In so doing I have had no illusions about the social implications of my achievements. When I obtained an acquittal in a meritorious case (which did not always mean innocence) I have had the satisfaction of knowing that I helped to prevent an injustice by mitigating the rigors of law. When I succeeded in enabling a malefactor to escape his just deserts I had the glowing gratification of having accomplished a professional *tour de force*.

This gratification was intensified by the knowledge that I had lived up to my obligations as an officer of the court, and had acted in accordance with the codes of legal ethics and centuries of tradition.

Canon 5 of the Code of Ethics of the American Bar Association is as follows:

> *The Defense or Prosecution of Those Accused of Crime.*
>
> It is the right of the lawyer to undertake the defense of a person accused of crime regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law. The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

It will be seen that I have a *right* to take a case even if I believe in the defendant's guilt, but not a duty. The ten foot pole fellows to whom I earlier referred, and who are conspicuously represented upon the Ethics Committees that make up these codes, needless to say seldom avail themselves of this right. The task therefore of seeing that "victims of only suspicious circumstances" are not "denied proper defense" falls upon the criminal lawyer.

If a lawyer takes a criminal case he may not ethically withdraw after he becomes convinced of his client's guilt unless he has previously warned the client that that is his regular practice. (A.B.A. Ethics Committee, Opinion 90) Without such warning he must remain in the case even though his client admits his guilt to him, and his professional duty is further defined by Canon 15:

> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

But there are some cases that a lawyer has not even a right to refuse. It is the practice in many jurisdictions for the courts to assign lawyers to defend indigent defendants accused of crime, and as officers of the court they are honor bound to accept the assignment (A.B.A. Ethics Committee, Opinion 55). It is frequently spoken of with pride by lawyers (including those who wouldn't touch a criminal case) that the murderers of Garfield and McKinley were defended by able, assigned lawyers who gave their clients their utmost professional devotion.

What is a lawyer's duty when the Court assigns him to defend a person charged with crime? He is, in effect, directed by the Court, the protector and shield of Society and the official repository of justice, to give the accused his "entire devotion. . . warm zeal. . . and the exertion of his utmost learning and ability." In short, it is his job to do all that he can to win his case. He must do so, it is true, by "rules of law legally applied." Whatever that may mean, there is no doubt that the rules of evidence and procedure give him plenty of scope.

I have been assigned by the Court in many murder cases and I have usually believed that instructions something like this were implicit in my assignment: "I have assigned you to this case because I believe you know your business. The District Attorney and the police will do their damnedest to send your client to the electric chair which I have no doubt he richly deserves. I shall expect you to use all your ability to prevent them from succeeding."

No judge has ever assigned me in precisely that language, but that is what I have understood my mandate to be. I might add that, in my opinion, any lawyer who does less for a client is unfit to remain a member of the bar. When a defendant engages a lawyer or has one assigned to him he has but one simple and understandable object; he wants to be free. He does not want to be edified with moral precepts, or be told that he should subordinate his selfish interests to the public good by pleading guilty and atoning for his sins. He wants to be free, and it's the lawyer's job to help him.

This is one reason why I have had misgivings about a public

defender system. It seems absurd to have two governmental agencies, both supported by the taxpayers, one trying to put a man in jail and the other trying to keep him out. It is hard to see how the public defender, a public servant, can satisfactorily fulfill his obligations to society and to his client. In fact, it is hard to determine which is his client.

It is clear that it is a lawyer's duty to defend his client, guilty or innocent to the best of his ability. How is he supposed to do this? In his brilliant book, *Courts on Trial,* Judge Jerome Frank of the United States Court of Appeals has collected copious illustrations from books on trial technique, books on cross-examination, and bar association lectures by eminent lawyers and judges, demonstrating that the distortion or suppression of facts and the befuddlement of juries enjoys the highest legal sanction.

"Do the lawyers strive to pick impartial jurors?" says Judge Frank. "Do they want jurymen whose training will best enable them to understand the facts of the case? Of course not. If you think they usually do, watch the trial lawyers at work in a courtroom. Or read the books written for trial lawyers by seasoned trial lawyers."

"In cross-examination," Judge Frank quotes from a well-known writer, "the main preoccupation of counsel is to avoid introducing evidence, or giving an opening to it which will harm his case. The most painful thing for an experienced practitioner . . . is to hear a junior counsel laboriously bring out in cross- examination of a witness *the truth . . . which it was the junior's duty as an advocate to conceal.*" (The italics are mine.) Judge Frank adds this comment: "A lawyer, if possible, will not ask a witness to testify who, on cross-examination, might testify to true facts helpful to his opponent."

Canon 5 of the Code of Ethics to which I have already referred states that it is reprehensible for a prosecutor to suppress facts or secrete witnesses capable of establishing the innocence of the accused. The soundness of this is obvious. The prosecutor is a quasi-judicial officer and it would outrage every concept of decency and morality if the rule were otherwise.

However, it is interesting to note that no such prohibition is

placed upon defense counsel. I am not sure what is meant by "the suppression of facts," but I am convinced that I would not be doing my duty to my client if I failed to use every effort to keep damaging facts from getting to the jury. If that is a suppression of facts, then I believe that I have a deep obligation to suppress them.

The wisdom of ethics committees, which sometimes, like the peace of the Lord, passeth understanding, does not give me the same latitude when questions of law are involved. If my client's acquittal or conviction depends, as it sometimes does, upon the judge's interpretation of a rule of law, my duty is clear. Opinion 280 of the Professional Ethics Committee of the American Bar Association says that a lawyer is "an officer of court and it is his duty to aid the court in the due administration of justice. He should disclose to the court any decisions adverse to his position of which opposing counsel is apparently ignorant, and which the court should consider in deciding the case." In brief, I must not sit quiet, as I formerly unethically did before I read Opinion 280, and pray that the judge and prosecutor do not know the damning case in point. I must speak up even if it means sending my client to prison.

But there is more to winning a criminal case than the suppression of damaging facts. Suppose the facts come out, and I know, because my client has told me so, that the prosecution's witness is telling the truth.

I may not call the defendant or some other witness to contradict him, because that would be condoning perjury. But I may do what seems to me not to be morally different: I may use all my skill as a cross-examiner to make the honest witness appear to be testifying untruthfully. In fact, if I am to discharge fully my duty to my client, that is what I must do.

I, like all lawyers who are frequently engaged in trying cases, have had success at times in making truthful witnesses appear to be liars. That is to say, I have profited from the books I have read on the Art of Cross-examination and from listening to great lawyers in court. Every book I have read on the subject, and I

have read many, devotes particular attention to the technique of destroying honest witnesses. It is usually considered to be an easier job than destroying a dishonest one.

In dwelling upon the sophistries and ethical confusion that arise in a criminal case I do not mean to imply the same situations do not exist in civil cases. In fact a justification, specious perhaps, but justification nevertheless, might be made for the lawyer who is trying to save some poor devil's life or liberty. It can be argued that it is more worthy to get a man out of prison than to get him out of an improvident contract.

The basic difference is, however, that a civil case is a private fight and a criminal case is a public one. If John Doe loses his breach of contract case it means that he won't collect some money. If the District Attorney fails to put Public Enemy behind the bars it means that the bulwarks of society are weakened. The proper administration of law, civil and criminal, is necessary for the preservation of a free society, but the effects of a faulty, irrational criminal law are of deeper social significance.

Here is the explanation of the general attitude toward the criminal lawyer. He is in the anomalous position of serving society and fighting it at the same time. He is the devil's advocate and his professional colleagues, who shun the role themselves, console him with comforting canons of ethics.

The Legal Aid Society, New York City —A Review*

By Charles P. Curtis

There are a number of ways to tell the story of legal aid. The least satisfactory would be to try to tell it from the point of view of the bar. For one thing, it would be only about half the story. The American Bar Association, although it was founded in 1878, only two years after the first legal aid society, which is the subject of this book, did not even recognize legal aid for over forty years. The Association did not even have a committee on legal aid till 1921. (46 ABA Reports, 1921, p. 493).

The bar took the attitude that the generosity and public spirit of the individual practitioner were sufficient to take care of the poor. It is all too plain that this attitude was due either to ignorance or to self-interest. The lawyers either did not know the facts or else they feared that, in some manner that has never been elucidated, organized legal aid would take paying business away from practicing lawyers. The truth, of course, is that just as it is necessary that there be hospitals and clinics to take care of the poor who have physical ailments, so is it necessary that there be legal aid organizations properly financed, staffed and equipped, and the existence and location of which are known to welfare organizations, court officers, the police and the community in general. It is equally the truth that legal aid organizations take no cases which practicing lawyers would like to handle, but, on the contrary, do take hundreds of thousands of cases which practicing lawyers would find a heavy burden and many of which, to speak plainly, they would find a good deal of a bore.

The fact is, legal aid work is not merely an obligation. It is an opportunity. In the public relations of the bar, the direct attack

* The Legal Aid Society, New York City, 1876–1951, by Harrison Tweed, published by the Society, 1954; pp. 122.

defeats itself. Defensive tactics are worse than useless. Bar associations will not build a high public respect for the bar by telling the world how noble lawyers are, or by defending them against attacks, no matter how unjust. The bar will make people believe in the integrity and civic usefulness of lawyers only by what they accomplish in their proper field of endeavor.

As late as 1945, the American Bar Association's Committee on Legal Aid, on whose report in 1940 I have drawn for my last two paragraphs, could say, when it asked for an appropriation of $10,000 a year,

> "The issue lies deeper than the naked question whether the sum of money suggested above is to be dedicated by this Association to the establishment of what is needed in the way of legal aid. At the bottom lies the query whether the bar, acting through this Association, is prepared, first, to cast off its traditional timidity and self-consciousness, then to inform the public of the importance of consulting lawyers in business and personal affairs instead of taking chances on the advice of notaries, realtors, accountants and insurance agents, and, finally, to see to it that men and women all the way up and down the income scale can easily and confidently and for fair compensation obtain the legal help they need. If the answer is in the affirmative, the first step should be to make an honest and intelligent and properly financed effort to establish legal aid throughout the country."
>
> "If this call to the American Bar Association goes unanswered, the small group of lawyers who have been the backbone of legal aid may turn to the civilian welfare agencies throughout the country to assume the leadership. The experience of the last few years indicates that the response will be favorable, prompt and effectual. It suggests that legal aid, which was first conceived by public-spirited civilians and which has never had the general and wholehearted support of the bar, will go ahead faster and further if those few lawyers who believe in it can use their energy

in constructive work rather than in batting their heads against the doors of bar associations."

A better way, and not so depressing, would be to adopt the Great Man theory of history, and ask another Carlyle to write it. As William James said in his essay on Great Men and Their Environment, "The best woodpile will not blaze till a torch be applied"; and here too, for forty years, as James went on to say, "the appropriate torches seem to have been wanting."

It took the bright torch of Reginald Heber Smith's classic book, *Justice and the Poor,* to ignite the woodpile. This was in 1919. The Carnegie Foundation was solicited for funds. It retained Reginald Heber Smith, then the attorney for the Boston Legal Aid Society, to make a study. The result was the Carnegie Foundation Bulletin Number Thirteen, *Justice and the Poor.* It is not only the classic on the subject, but also a landmark in the philosophy of the law. It established the basic propositions that our form of government guarantees equal protection of the laws, that it is intolerable to the democratic concept that equal justice be denied the poor simply because of poverty, that legal aid organizations offer a partial solution, and that the responsibility for the development of such organizations rests with the organized bar.

Charles E. Hughes, then the President of the American Bar Association, caught fire at once and applied the torch to the woodpile in a speech to the Association in August 1920. A committee on legal aid, the first such committee, was appointed with Hughes himself as chairman, but he had to resign the next year when he became Secretary of State. Smith continued to feed the flame from the committee. Then came Harrison Tweed, and as chairman he made a bonfire which is still burning.

But the best way to tell the story of legal aid is the way Tweed tells it in this book. For here is the history of the best as well as the first legal aid society in the country. It is told with grace and humor. It has the salt and pepper of detail. There is the elegant menu of the Society's first dinner, and it takes a whole page. There is the verbatim telephone conversation which brought

Tweed into legal aid to begin with, "I know nothing about legal aid and haven't the slightest interest in it," to which Thacher's reply was, "That's fine. I want someone who doesn't know it all." There is an example of the efficacy of profanity, by the President. There is also the efficacy of refreshments at annual meetings (p. 45). And this reviewer might, but will not, compare and give his opinion on two poems, one by the President, the other by Mrs. Van Wagoner, the Assistant to the President. But no book is without a blemish. There is an egregious misstatement on page one, that the book "suffers from the deficiencies of a lawyer trying to be a writer of history," and that its style is more "appropriate to the brief or the corporate mortgage." The author's only excuse is his own refutation.

The story of the Legal Aid Society of New York begins in 1876, two years before that of the American Bar Association and forty-five years before they even met. At the start, the Society was no more than an organization to help German immigrants, Der Deutsche-Rechtsschutz-Verein, and such it remained until a New York lawyer, Arthur v. Briesen, became its president. Between 1889 and 1916, he built the ark.

He was succeeded by Charles E. Hughes, who had been Associate Justice of the Supreme Court and was later to be our Chief Justice. He resigned in 1921 to become Secretary of State. Edgerton Winthrop took his place until his death five years later. Then came Allen Wardwell, later President of the Association of the Bar of the City of New York. Tweed succeeded him, and resigned to become President of the Association. Whitney Seymour followed Tweed into both presidencies. Timothy Pfeiffer is now the President of the Society.

This is more than a list of names. It is the clue toward answering the question which lies behind this book and behind everything I have been saying, why is this the best legal aid society in the country?

The presidents of the Society, Hughes, Winthrop, Wardwell, Tweed, Seymour, and Pfeiffer, have all been leaders of the Bar, senior partners, who have treated the Society as they do their own

firms, and legal aid for what it is, the practice of law, part of their own practice. So likewise do all the lawyers who work for the Society, whether as officers, directors, or as counsel. From top to bottom, the New York bar treats its Legal Aid Society as its own law office. Law students work for the Society as part of their legal education, six a year from Columbia, three each from New York University and the New York Law School. Though this is no less true of other schools, among them Harvard, Duke, and Southern Methodist, the New York Society has also three hundred applications a year, more than it can take, from young graduates who want to start their legal careers with three years in legal aid; and they come from the top quarter of their law school classes. Lawyers who are not working for this Legal Aid Society support it to a far greater extent than lawyers do anywhere else. Half its financial support comes from lawyers. Over the country, less than a tenth of the money for legal aid comes from the Bar. (8½%; Emery A. Brownell's Legal Aid in the United States, 1951, Lawyers Cooperative Society, p. 237).

The reason why this Legal Aid Society of New York is the best, and why its history is the best way to tell the story of legal aid, is that in New York the Bar has come nearest to making legal aid its own affair. People who get legal aid in New York are not objects of charity. They know they are the clients of the Bar. Only in this way will the Bar regain our confidence and admiration.

What a stupid figure we so often make of Justice! A solemn maiden sitting blindfold, holding scales she cannot read! Nor can she see the three out of five defendants charged with crime who cannot afford attorneys of their own choosing, nor her thirty million suppliants, a fifth of our people, who need legal aid and do not get it (Brownell, supra, pp. 85 and 86). So long as justice is a luxury, we shall be grateful to anyone who helps to make it less so, except the lawyers. We may admire what they do, but there is no reason to be grateful to them for doing it. For it is their job.

Recent Decisions of the Supreme Court of the United States

by Robert B. von Mehren and Joseph Barbash

FCC v. American Broadcasting Co., Inc.
FCC v. National Broadcasting Co., Inc.
FCC v. Columbia Broadcasting System, Inc.

(April 5, 1954)

The United States Criminal Code prohibits the broadcasting of ". . . any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . ." 18 U.S.C. §1304. For some time the Federal Communications Commission has been concerned with the broadcasting of so-called "give-away" programs, such as "Stop the Music", "What's My Name" and "Sing It Again". Believing that these programs were no more than old-fashioned lotteries "under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit", the FCC unsuccesfully urged that the Department of Justice bring indictments based upon §1304. It tried, also without success, to secure legislation specifically outlawing "give-away" programs.

Having failed in these enforcement efforts, the FCC promulgated rules designed to enforce its conception of §1304. These rules, *inter alia*, prohibited the granting of a license or the renewal of a license where the applicant proposed to broadcast "give-away" programs. In separate actions the three principal networks challenged these rules, and a three-judge district court enjoined, with one minor exception, their enforcement. The Supreme Court noted probable jurisdiction and consolidated all of the cases for argument. The judgment of the lower court was affirmed unanimously in an opinion by the Chief Justice.

The first issue passed upon by the Supreme Court was whether the FCC had the power to promulgate rules designed to enforce §1304. The Court said:

> "Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce §1304. Indeed, the Commission would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, either by general rule or by individual decisions . . . ."

But, the Court said, "Unless the 'give-away' programs involved here are illegal under §1304, the Commission cannot employ the statute to make them so by agency action . . . ." It followed that the fundamental issue for

decision was "whether this type of program constitutes a 'lottery, gift enterprise, or similar scheme' proscribed by §1304."

There was agreement among the parties that the "three essential elements of a 'lottery, gift enterprise, or similar scheme' [are] (1) the distribution of prizes; (2) according to chance; (3) for a consideration." It was also agreed that the first two elements were present; the only dispute was whether there was consideration. In its brief the Commission pressed the ingenious argument that there was consideration because " 'the radio giveaway looks to the . . . material benefits to stations and advertisers from an increased radio audience to be exposed to advertising.' " The networks insisted that "the participation of the home audience by merely listening to a broadcast does not constitute the necessary consideration."

The Court rejected the FCC's ingenuity and held for the networks. It examined the decided cases defining consideration with relation to lotteries, and it concluded that none of them found consideration where the effort of the contestant was so insubstantial as merely listening. Section 1304 is a criminal statute, and "it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime." The Justice Department's refusal to enforce §1304 against "give-aways," together with the Post Office Department's refusal to stretch the postal laws in a manner similar to that attempted by the FCC with respect to §1304, supported the Court's position.

After finding that the FCC had pressed beyond the permissible limits of §1304 and had thus exceeded its rule-making power, the Court concluded by suggesting that if "give-away" programs constitute a social evil, they must be checked by remedies other than "administrative expansion of §1304." Because the Court had previously stated explicitly in its opinion that a criminal indictment against a broadcaster of "give-away" programs must fail, it would seem that the only avenue which remains open to the FCC is that of appealing to Congress for new legislation. Having travelled this road once, the FCC may feel that it is quixotic to try again.

RAILWAY EXPRESS AGENCY, INC. V. COMMONWEALTH OF VIRGINIA

(April 5, 1954)

No area of constitutional law is more alive for the corporate practitioner than the constitutionality of state taxes on corporations involved in interstate commerce. It is an area of hope and despair—hope that causes lost in the legislatures can be won in the courts, despair of predicting with reasonable certainty whether litigation will be worth the enormous cost of taking the case all the way up. The instant case augments the dichotomy. It settles a few questions favorably for the taxpayer; at the same time it suggests problems for future litigation.

Railway Express' only business in Virginia was interstate, consisting of pick-up and delivery of interstate parcels and movement of these and other

interstate parcels through the State. It had bank deposits in the State of about $100,000 and approximately $130,000 in real estate and tangible personal property.

Virginia levied taxes on express companies under two sections of its Code. The first, labelled "Taxes On Property of Express Companies": (1) imposed a tax of 50¢ on every $100 of the assessed value of intangible personal property; (2) imposed a tax of 20¢ on every $100 of money on deposit within the State, and (3) permitted local levies on real estate and tangible personal property. The second, called "Annual License Tax", provided that "for the privilege of doing business in this State", express companies were to pay "in addition to . . . the property tax as herein provided" an "annual license tax" upon gross receipts earned in the State "on business passing through, into or out of" the State. The tax was 2 and 3/20 percent of a base computed on a mileage proportion.

Railway Express was assessed and paid without protest a tax on the amount it had on deposit and upon its real estate and tangible personal property. It challenged as unconstitutional, however, an assessment of about $60,000, representing 2 and 3/20 per cent of its $3,000,000 of gross receipts allocable to Virginia under the statutory mileage formula.

The Virginia Supreme Court upheld the tax. It conceded that as a privilege tax on gross receipts, the $60,000 tax would be invalid under the United States Supreme Court's decision in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), inasmuch as Railway Express did only interstate business in Virginia. But it held that the tax could be regarded, despite the legislative description, as a valid property tax imposed on the intangible going-concern value of Railway Express' business in Virginia.

On appeal, the Supreme Court of the United States reversed, 5 to 4, Mr. Justice Jackson writing the opinion. Conceding that a state has the power "to tax, without discrimination, all property within its jurisdiction and to include in its assessment, or to assess separately, the value added by the property's assemblage into a going business, even if that business be solely interstate commerce," the Court held that:

> (1) although "great respect" was to be given the conclusion of the Virginia Supreme Court, the Supreme Court of the United States must make its own characterization of the tax;
>
> (2) in making this characterization the "practical operation" of the tax must be examined;
>
> (3) the tax at issue could not be properly characterized as a property tax on intangible going-concern value or as levied on local incidents separable from interstate commerce, but must be considered a privilege tax; and
>
> (4) a privilege tax cannot be applied to an exclusively interstate business.

To support the first proposition, the Court quoted from *Galveston, H. & S.A.R. Co.* v. *Texas*, 210 U.S. 217, 227 (1908), as follows:

> "neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

In performing its duty of making an independent characterization, however, the Court gave weight to the fact that the legislature had described the tax as being one "for the privilege of doing business" in Virginia, had called it "an annual license tax", and had declared it to be *in addition* to the "property tax". These legislative declarations, not the characterization by the Virginia Supreme Court, were consistent with the "practical effect" of the tax.

The Court determined the "practical effect" of the tax in two ways. First, it examined its application to the particular taxpayer, whose tangible property in Virginia was worth about $130,000 (exclusive of money, to which the Court thought no going-concern value could be attributed). As neither the State court nor the Tax Commission had stated "any amount which it considers to be the going-concern valuation", the Court began by computing "a possible valuation base". At the rate imposed by the statute on intangible personal property (50¢ on $100), this base would be over $13,000,000; at the rate imposed on gross receipts (2 3/20 per cent), the base would be over $3,000,000. To ascribe a $13,000,000 going-concern value to tangible property worth $130,000, the Court said, "may not overtax the express company, but it does overtax our credulity". To ascribe the $3,000,000 figure "is on its face an extreme attribution".

Second, the Court dealt with the tax generally. The impact of the tax was not upon the "proportionate total worth of the property" of Railway Express, for it would be levied even if Railway Express had no physical property in the State. Moreover, "mere gross receipts" are not a "sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume".

The Court next considered and rejected the argument that the tax was validated by Virginia's protection of localized incidents: pick-up, delivery and movement through the State. Citing, *inter alia, Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951), and the recent *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954) (The Record, April 1954, 192–93), the Court held that such local incidents, being an integral part of an interstate movement, "are not adequate grounds for a state license, privilege or occupation tax".

Finally, the Court dealt with the fact that it had previously dismissed for want of a substantial federal question two appeals from decisions of the Virginia Supreme Court holding an almost identical tax to be a valid property tax. In one case the taxpayer was a Virginia corporation which "derived its privilege to exist from that State", and in both cases the taxpayers were engaged in "intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State". Thus it had not mattered to the Court whether the tax had been properly characterized

below, inasmuch as it was sustainable as a privilege tax. The appeals in those cases, the Court pointed out, "did not question the fairness of apportionment of revenues between the interstate and intrastate business so as to require such consideration as we gave in *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653".

Mr. Justice Clark, joined by the Chief Justice and Justices Black and Douglas, dissented. Finding that the tax was nondiscriminatory, fairly apportioned, and not excessive, the dissenters would have upheld it for the reasons given in Justice Clark's dissent in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 610–615 (1951). Even accepting the Court's approach in the *Spector* case, however, the dissenters would have held the tax valid. In that case the Court had accepted, without re-examination, the Connecticut Supreme Court's characterization of the tax as a privilege tax, and the dissenters here would have accepted the Virginia Court's characterization. They would not deny the right of the United States Supreme Court to re-examine the label affixed by the State court, but they would find here that the label was not "wholly inconsistent with the State's taxing scheme" and did not "deliberately misbrand the tax" to avoid unconstitutionality. They charge, however, that "if the label makes the tax invalid, the label is accepted, if the label validates the tax, the Court will pierce the label". But they then make the somewhat inconsistent statement that "in sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legislature gave it . . . presumably the same tax assessed under a different name by the use of different words would be upheld".

Perhaps the principal importance of the majority opinion lies in its treatment of two questions of approach. First, by explicitly looking through the label affixed by the State Court, the majority rejects apparent intimations in recent prior decisions that such labels are conclusive. See, e.g., *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 84 (1948). Second, by making the point that the tax in question could have been imposed by its terms upon a taxpayer who had no tangible property at all, the majority invites consideration of the statute on its face, rather than as applied to the particular taxpayer in the law suit.

The majority opinion is important in several other respects. Whatever the dissenters say about labels, the majority opinion would seem to render unconstitutional any state gross receipts tax on a wholly interstate business. Logical consistency, moreover, would seem to require the invalidating of any income tax on a wholly interstate business unless the tax were properly related to tangible property within the State. Finally, the majority opinion raises a serious problem concerning taxes on taxpayers engaged in both intrastate and interstate business. If such taxes are subjected to the same kind of analysis as the tax here, many taxes measured by an apportionment of all the business of a taxpayer, interstate as well as intrastate, could not be justified merely on the ground that they are imposed on the intrastate business. Whenever the apportionment is inconsistent with the characterization of the tax as a tax on intrastate business, it will now be easier to

argue that the tax should be struck down. Support for this position may be found in *Galveston, H. & S.A.R. Co.* v. *Texas,* 210 U.S. 217 (1908), *supra.* But see *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653, 663 (1948), *supra.*

Lest too much comfort be taken by interstate taxpayers, it should be observed that the four dissenting judges based their position in part on the *Spector* dissent. Justices Clark, Black and Douglas, the three judges dissenting in the *Spector* case, are now joined by the new Chief Justice. As the Court's opinions in this area are so confused and inconsistent that cases can be found to support almost every position, it is always possible that a further change in the composition of the Court would result in the overruling of both the *Spector* case and the instant case.

Recent Decisions of the New York Court of Appeals

by Sheldon Oliensis and Joseph H. Flom

AUER V. DRESSEL

(306 N.Y. 427, March 12, 1954)

A majority of the class A stockholders of R. Hoe & Co., Inc., a New York corporation with two classes of voting stock, brought this proceeding to compel the president of the corporation to call a special meeting of the class A stockholders.

Under the certificate of incorporation, the class A stockholders had the right to elect nine of the eleven directors, the common stockholders electing the other two. Vacancies were to be filled by the directors remaining in office.

The stated purposes of the proposed meeting included voting upon resolutions:

> (1) Endorsing the administration of the corporation's previous president, who had been removed by the directors, and demanding his reinstatement;
>
> (2) Amending the certificate of incorporation and by-laws so that, upon the removal of a director by the stockholders, the vacancy could be filled only by the stockholders of the class theretofore represented by the removed director.
>
> (3) Proposing that the stockholders hear certain charges against four of the directors and, if appropriate, vote upon their removal and replacement.

The petition was opposed on the ground that none of the purposes was a proper one for a class A stockholders' meeting. Rejecting this contention, Special Term summarily directed that the meeting be called. The Court of Appeals, Judges Van Voorhis and Conway dissenting, affirmed this order.

The majority held, in an opinion by Judge Desmond, that there was nothing invalid in the proposed approval of the previous president's administration and demand for his reinstatement. While the stockholders could not directly effect changes in corporate officers, their action would put on notice the directors who would stand for election at the annual meeting. The test which the Court thus establishes appears to be that a stockholders' meeting may be called so long as the action proposed to be taken is neither illegal nor improper, although it may not be directly effective.

The second and third proposals were also held valid. Stockholders have

the inherent power to remove directors for cause. Even where, as here, the certificate of incorporation authorized the directors to remove a director on charges, such procedure is in addition to, and does not derogate from, the inherent power of the stockholders to do so. Since the class A stockholders have the right to elect nine directors and remove them on proven charges, they may appropriately have the further power to elect successors to directors so removed.

The dissenting judges were of the opinion that the president was justified in declining to call the meeting demanded, on the ground that none of the above proposals could legally be voted upon at such meeting.

A vote upon the first proposal would be an "idle gesture," since it is the function of the directors, not the stockholders, to appoint corporate officers.

Nor could the second proposal legally be acted upon at a meeting of the class A stockholders. Under the certificate of incorporation, the two directors elected by the common stockholders were authorized to participate in filling vacancies caused by the removal of class A directors. The proposed amendments would impair these rights and were therefore invalid without the approval of a majority of the common.

The major portion of the dissent is directed against the third proposal: the stockholders' hearings of charges against four directors with a view to their possible removal. The dissenters pointed out that stockholders cannot recall directors merely for the purpose of changing the policy of the corporation. Where there is fraud or breach of fiduciary duty, directors may be removed by appropriate judicial action or, where the power of removal has been granted to them, by the directors. The dissent expressed doubt as to the stockholders' continued power of removal in the latter case, although recognizing the existence of such power in the stockholders in the absence of its delegation to the directors.

The dissent argues forcefully against the unfairness of stockholders' adjudging directors guilty of fraud or breach of faith. Since it is impossible for a large number of stockholders to conduct a hearing in person, there must be "trial by proxy" and a judgment of guilt "by shareholders who have neither heard nor will ever hear the evidence against [the accused directors] or in their behalf." Since the proxies here were the very persons who made the charges, the accused directors may have already been prejudged. The accused directors should not be removed "without a full and fair trial", either by a court or by the board of directors. The dissenters therefore would bar removal of directors by stockholders, at least where the certificate of incorporation authorized the directors to take such action.

A significant element of this decision is its holding that, even where the certificate of incorporation grants the directors the power to remove their fellow directors for cause the stockholders' inherent power of removal continues. Draftsmen of corporate charters who wish to limit the power of removal to directors may therefore be well advised to provide explicitly that such power shall be vested *exclusively* in the directors, though the majority opinion casts some doubt on the validity of even such a provision.

MATTER OF RIVERDALE FABRICS CORP.
(TILLINGHAST-STILES COMPANY)
(306 N. Y. 288, Feb. 25, 1954)

Tillinghast-Stiles Company sought arbitration of a dispute arising under a sales memorandum of yarn. The memorandum made no direct reference to arbitration but contained the following printed provision:

> "This contract is also subject to the Cotton Yarn Rules of 1938 as amended."

These Rules provided that such provision meant that the " 'Cotton Yarn Rules' are incorporated as a part of an agreement * * *." The Rules also contained an elaborate exclusive arbitration provision.

Riverdale Fabrics Corp. moved to stay the arbitration on the ground that arbitration had not been agreed upon in writing as required by statute. Special Term refused a stay. The Appellate Division unanimously reversed, 281 App. Div. 831 (2d Dep't 1953), but after the Court of Appeals decision in *Matter of Level Export Corp.* (Wolz, Aiken & Co.), 305 N.Y. 82 (1953), reargument was granted and the Appellate Division by a divided court reversed itself, 281 App. Div. 983 (2d Dep't 1953), and affirmed the Special Term.

The Court of Appeals, in an opinion by Judge Van Voorhis, reversed the Appellate Division and ordered that a stay of arbitration be granted. Judge Desmond dissented in an opinion which was concurred in by Judge Dye. Judge Froessel dissented in a separate opinion.

The Court held that the appellant was not bound by the arbitration provisions of the Cotton Yarn Rules. It regarded as controlling the fact that such provisions were not specified in, or clearly incorporated into, the contract. Thus the Court stated:

> "The intent must be clear to render arbitration the exclusive remedy; parties are not to be led into arbitration unwittingly through subtlety."

The Court relied heavily upon *Matter of General Silk Importing Company* (Gerseta Corp.), 200 App. Div. 786 (1st Dep't 1922), *aff'd*, 234 N.Y. 513 (1922). In that case a motion to compel arbitration was denied although (i) the contract there in issue was made between members of a silk association, (ii) the contract provided that "sales are governed by" certain rules adopted by the association, and (iii) such rules contained a provision making arbitration the exclusive method of settling differences under the contract.

Judge Van Voorhis distinguished the *Level* case. He pointed out that the contract there in issue "incorporated verbatim by reference" the rules of an association (which rules contained an arbitration provision). In the instant case, the contract was stated only to be "subject to" such rules. The language given effect in the *Level* case is, therefore, of great significance to the draftsman. The standard contract there provided:

> "This Salesnote is subject to the provisions of STANDARD COTTON TEXTILE SALESNOTE which, by this reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller."

The dissenting judges felt the *Level* case was controlling. Thus, Judge Desmond compared the provisions of the contract in the instant case with those of the contract in the *Level* case and stated: "The words used in one instance were no more nor less subtle, artful or devious than in the other."

Draftsmen are thus presented with relatively similar forms of contract leading to different results. To be absolutely certain that arbitration is provided for, therefore, explicit reference thereto should be made in the contract. Barring this, the language used in the contract in issue in the *Level* case should be scrupulously followed.

Committee Report

COMMITTEE ON FOREIGN LAW

FOREIGN EXCHANGE CONTROL IN NEW YORK COURTS

Because of maladjustments in international trade and the shortage of "hard" currencies, most economically significant foreign countries have had to enact more or less drastic regulations in regard to the convertibility of their currencies and the acquisition by their nationals of goods and assets from other countries. Such regulations usually prohibit dealings by residents of these countries in foreign exchange or the acquisition of foreign assets, unless a license from some governmental agency is first obtained, and provide that all foreign exchange so acquired be reported and surrendered against local currency. Unfortunately there is every likelihood that foreign exchange controls which, of course, constitute part of the law of the countries concerned, will continue in effect for many years. This Report deals briefly with the effect given to these regulations in federal and state courts in New York, where substantial assets owned by foreigners are located (and often can be attached), and where many contracts relating to international business transactions are either made or are to be performed.

As a political matter, countries which have such exchange control can be divided into two categories: first, those countries (England, for example) which have friendly relations with the U.S., and whose controls, though stringent, are applied in a reasonably fair manner, by any objective standard, and second, those countries, including the "Iron Curtain" countries, where the controls are frequently a mere cover for discrimination, confiscation and the pursuit of economic policies hostile to the free world. One important question is how far this political distinction will be reflected in N.Y. court decisions involving such controls.

The effect to be given such controls is in certain respects governed by the International Monetary Fund Agreement of 1944 to which the United States became a party by act of Congress.[1] This Fund, though founded in the hope of a gradual elimination of controls, nevertheless specifically envisages that the various members may maintain such controls in effect, subject however to a certain degree of international supervision. One provision of the agreement (Article VIII, Section 2b) provides that: "Exchange contracts which involve the currency of any member and which are contrary to the exchange

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Editor's Note: The report which is published here was prepared by a Subcommittee of the Committee on Foreign Law consisting of Martin Domke, Chairman, Peter Borie, Allan A. O'Gorman, F. E. Oppenheimer, Angelo Piero Sereni and Otto C. Sommerich.

control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any members." Membership in the Fund, however, is not restricted to countries whose economic policies are consonant with ours, and certain "Iron Curtain" countries, e.g. Czechoslovakia, continue to be members. Nevertheless in the case of any contract clearly coming under the terms of this Article, the courts of this country will feel bound to recognize and give effect to the exchange control regulation of the foreign state.[2]

Two types of cases are most likely to arise in the United States in which the foreign controls may play a legally significant role. First: where a creditor of a debtor who is located in a foreign country seeks to collect his debt (in dollars) from assets of his debtor which are found here, and where the debtor pleads the absence of a license required from the exchange authorities of the country in question for the transfer of the funds to pay the debt. It may make a difference whether or not the contract is governed by New York law or is to be performed here. Second: where a person domiciled or carrying on business in the foreign country maintains assets in the U.S. and seeks to dispose of them in a manner which, though consistent with the law of the United States, is contrary to the law of his own country, because he lacks a license from the exchange authorities of his homeland. A closely related question is whether the foreign government would be entitled to claim these assets for itself in exchange for a payment abroad of the equivalent amount to the owner in foreign currency.

Where the International Monetary Fund Agreement did not apply in cases decided before its enactment or for any other reason, the courts in New York had to follow general conflict of laws principles,[3] and have relied on such criteria as place where contract was made, place where contract is to be performed, etc. to determine whether the law of the country imposing the controls should govern the transaction as "the proper law of contract" or whether either the law of the forum, or some other law should apply.[4] They have also felt free to apply the concept of public policy of the forum to the controls involved, for example, in recent years the policy against "confiscatory" legislation when "Iron Curtain" controls were under consideration.[5] The most logically significant factors in such a consideration would seem to be the number and the degree of the contacts of the creditor or of the transaction with the forum (i.e. the United States), as balanced against the contacts with the country imposing the controls.[6] In those cases where contacts with the United States dominate, the courts will and should be reluctant to refuse to a bona fide creditor the right to satisfy his debt out of assets of his debtor in this country. The concept of "public policy" would be a sound basis to support such a result.

However, a recent decision of the New York Court of Appeals, *Perutz v. Bohemian Discount Bank in Liquidation*,[7] has cited the International Monetary Fund Agreement as authority for holding that foreign exchange control legislation (even of an "Iron Curtain" country, Czechoslovakia) is not contrary to U.S. public policy, and that a contract between two na-

tionals of such country, which is to be performed in such country, will not be enforced here, in the absence of a license from the exchange authorities for the payment of the obligation in a foreign currency.[8] This decision, however is consistent with previously settled conflict of laws principles,[9] and a more difficult question is whether the Monetary Fund Agreement will be held to require a court to apply a foreign control regulation so as to bar recovery under a contract which would otherwise have been enforced. In other words, how far will the policy laid down in the Fund Agreement, that our courts, in the interest of U.S. foreign policy, should give effect, in certain specified cases, to the exchange control regulations of other Fund members, overrule any contrary policy in favor of bona fide creditors. It will be interesting to note that after the *Perutz* decision a Czechoslovakian decree canceled the pension claims of persons who had been "active in maintaining the capitalist order,"[10] a concept most certainly not within the framework of the Monetary Fund Agreement! A second question is how far, if at all, can the courts go in making application of foreign exchange controls dependent upon whether the creditor will ever have an effective way of collecting on his claim in anything other than (to him) valueless local currency. Thus courts have ruled that legacies should not be transmitted to beneficiaries behind the "Iron Curtain," because of the lack of assurance that they may receive the shares intended for them by persons who, prior to their decease, were domiciled in the State of New York.[11] To the extent that a question of foreign policy of the United States is involved, the courts may seek the expression of views of the State Department (which, to be sure, is not controlling), since the basic reason for requiring the courts to give extraterritorial effect to exchange controls is that by so doing they are carrying out U.S. foreign policy as determined by Congress and the Executive.

Courts in the United States may give effect to operation in this country of foreign exchange control in a limited way, namely only to the extent that the regulations are in accord with the Fund Agreement and then only if "exchange contracts" are at issue. The rule does not apply to contracts involving property located in the U.S., where a foreign government seeks to reach, under its exchange control regulations, bank accounts and securities which foreign residents maintain with American banks. There is nothing in the Fund Agreement which compels the courts to favor the plaintiff-government. The well recognized principle that "confiscatory" legislation by a foreign government, involving property situated in the U.S. will not be enforced, is not affected by the Fund Agreement.[12] But the confiscatory character of such legislation is not always easy to determine.[13] Thus, war-time decrees of the Dutch and other governments in exile, for "protective custody" of the U.S. assets of their nationals, were upheld.[14] Yet it is far from being settled whether regulations by a foreign country which require that property in the U.S. belonging to its nationals be turned over to the government concerned in consideration for payment to the owner in local currency will be given effect in the U.S., where the purpose for the regulations is in the interest of the economic policy of the

foreign government. Clearly, a Czech or a Polish or a decree of any other satellite government so providing would be held ineffective, but such a claim asserted by the British Treasury against a British subject having a bank account in New York might well be upheld by a court in this country as not confiscatory.[15]

From the point of view of public policy, in the case of those countries which are the recipients of substantial U.S. financial aid, it may be justified to give effect to such regulations. Indeed, the Economic Cooperation Act of 1948, as amended,[16] provides that the recipient countries take "measures to locate and identify and put into appropriate use . . . . assets which belong to the citizens of such country and which are situated within the United States."

Admittedly the applicability of foreign exchange regulations in this country involves a consideration of our foreign policy which alone can be determined by the Executive Branch of the government. While in difficult cases the courts may seek the expression of views by the State Department, the final responsibility of determining the issue rests with the court. It is their exclusive prerogative to determine the extraterritorial application of foreign legislation. Exchange regulations do not make an exception.

April 15, 1954

NOTES

[1] 59 Stat. 512 (1945); see Nussbaum, Money in the Law, National and International 545 (1950).

[2] Under the case of *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381 (1926), there would appear to be no need to prove reciprocity. It may be, however, that the rule of evidence in the Federal courts under *Hilton v. Guyot*, 159 U.S. 113 (1895), does require proof of reciprocity. See Reese, "Full Faith and Credit to Statutes: The Defense of Public Policy", 19 U. of Chi. L. Rev. 339 (1952), and Lenhoff, "Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law", 15 U. of Pittsburgh L.R. 44 (1953).

[3] *Central Hanover Bank and Trust Company v. Siemens & Halske A.G.*, 15 F. Supp. 927, aff'd 84 F. 2d 993, cert. den. 299 U.S. 585 (1936).

[4] For a survey of cases see Friedmann, "Foreign Exchange Control in American Courts", 26 St. John's L.R. 97 (1951); Cabot, "Exchange Control and the Conflict of Laws: An Unsolved Puzzle", 99 U. of Pa. L.R. 544 (1951).

[5] Cp. *Zwack v. Kraus Bros. & Co., Inc.*, 97 F. Supp. 719 (S.D. N.Y. 1951), *Capitol Records, Inc. v. Mercury Record Corp.*, 109 F. Supp. 330 (S.D. N.Y. 1952).

[6] On the character of the American foreign assets control, wholly different from that of the foreign funds legislation of other countries, see Sommerich, "Funds Control in the United States", N.Y. L.J. of March 22 and 23, 1949.

[7] 304 N.Y. 533, 110 N.E. 2d 6 (1953). Cp. Meyer, "Recognition of Exchange Controls after the International Monetary Fund Agreement", 62 Yale L.J. 867 (1953) for an extensive consideration of that "cryptic" (p. 869) decision.

[8] See also Notes in 53 Col. L.R. 747; van Campenhout in 2 Am. J. Comp. L. 389; Gold in 3 Staff Papers of the International Monetary Fund 303 (1953) and Gold and Delaume in 80 Journal du Droit International (Clunet) 801 (with English

translation) who state at p. 807 "the precise scope of the decision of the Court of Appeals is not clear."

[9] A comment in 3 Buffalo L.R. 83 (1953) rightly states that the Court of Appeals was "faced with a reasonably uncomplicated version of this problem" (of recognition of exchange control). Reference to the *Perutz* case is also made in *Roach v. Welles*, 127 N.Y.S. 2d 138 (1954), involving payment of compensation for professional services in frozen foreign currency.

[10] N.Y. Times of May 10, 1953, quotes further from the wording of that Government decree: "The parasitic character of the latent and overt enemy must be ended by depriving the former representatives of the capitalist order and their assistants, who helped suppress the struggle of the working class, of their pensions or by considerably reducing them."

[11] *Matter of Klein*, 203 Misc. 762, 123 N.Y.S. 2d 866 (1952); *Estate of Julia Braier*, 305 N.Y. 148, 691 (1953); *Matter of Wells*, 204 Misc. 975, 126 N.Y.S. 2d 441 (1953).

[12] Cp. Domke, "On the Extraterritorial Effect of Foreign Expropriation Decrees", 4 Western Political Quarterly 12 (1951), and for further references Book Review, 2 Am. J. Comp. L. 548 (1953). See also *Sulyok v. Penzintezetikozpont Budapest (Central Corporation of Bank Companies)*, 304 N.Y. 704 (1952) and *Augstein v. Banska a Hurti*, 124 N.Y.S. 2d 446 (1953).

[13] See *Egyes v. Magyar Nemzeti Bank*, 165 F. 2d 539 (2d Cir. 1948) and the comment in 4 this *Record* 271 (1949).

[14] See *Rothschild v. N.V. Gebroeders Pappenheim's Tabakshandel*, 194 Misc. 479,889, 87 N.Y.S. 2d 189, 88 N.Y.S. 2d 157 (1949); the discussion in *State of the Netherlands v. Federal Reserve Bank of New York*, 210 F. 2d 455 (2d Cir. 1952), and *N.V. Suikerfabriek Wono-Aseh v. Chase National Bank*, 111 F. Supp. 833 (D.C. N.Y. 1953).

[15] Cp. *Solicitor for the Affairs of H.M. Treasury v. Bankers Trust Co.*, 304 N.Y. 282 (1952), which did not pass on the merits of such claim; the case involved only the protection of the New York bank which might have been liable to two different parties.

[16] See 115b(4), 62 Stat. 137; see Surrey, "The Economic Cooperation Act of 1948", 36 Cal. L.R. 509,553 (1948).

[17] A related question, namely, to give jurisdictional effect to a State Department letter of April 13, 1949, regarding non-recognition of Nazi-forced transfers of property (20 Bull. Dept. State 592), was considered in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij*, 210 F. 2d 375 (2d Cir. February 5, 1954).

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> To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.
>
> ROBERT NORTH

Any list of new acquisitions brings fresh excitement to both members and staff. One finds old friends with new subjects and new friends with old subjects, reactivated in modern dress. Suddenly a writ of CORAM NOBIS is served and a welter of titles are sprung. The MAN WHO NEVER WAS with OATHS AND AFFIRMATIONS and the CONSENT OF THE SENATE will contribute AMERICAN FOREIGN ASSISTANCE to effect the QUEENS PEACE. By stopping HELL ON THE BORDER we might render useless the REPORT ON THE ATOM and thus THE PRESENT DANGER WILL CEASE. An AMERICAN PRESIDENT by using AMERICAN LIBERTY AND NATURAL LAW will reveal the lesson of the HIDDEN THREADS OF HISTORY and bring about the principles of the LAW OF NATIONS that JUSTICE BE DONE! Titles are indicative of the age in which we live.

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